SUPREME COURT, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974
No. 74-1307

JOHN BOWMAN, HAROLD TAYLOR,
and RAY MICHAEL BOUDREAUX,

Petitioners,

vs.

PRESIDING JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES AND JURY COMMISSIONER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

JOHN BOWMAN, HAROLD TAYLOR,
and RAY MICHAEL BOUDREAUX, Petitioners,

v.

PRESIDING JUDGE OF THE SUPERIOR
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JURY COMMISSIONER OF THE SUPERIOR
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Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

Petitioners, John Bowman, Harold Taylor, and Ray Michael Boudreaux respectfully pray that a writ of certiorari issue to review the order of the Court of Appeal of the State of California, Second Appellate District, Division Four, in the above cause entered on November 28, 1974.

OPINION BELOW

The Court of Appeal of the State of California, Second Appellate District, Division Four, issued an unreported order granting a peremptory writ of mandate, printed in Appendix A. The Supreme Court of California denied a hearing and said order is printed in Appendix B.

JURISDICTION

The order of the Court of Appeal of the State of California, Second Appellate District, Division Four, was entered on November 28, 1974. A timely petition for rehearing was denied on December 17, 1974, a timely petition for hearing was denied by the Supreme Court of California on January 23, 1975, and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Does reliance upon voter registration as the sole source of criminal trial jurors violate the right to an "impartial jury of the State" guaranteed by the Sixth Amendment and the right to due process and equal protection as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America when the resulting venire does not represent a fair cross section of the community in that poor persons are under represented by 66-2/3% in relation to their population and poor persons of minority racial groups are virtually excluded therefrom?

2. Does setting aside a trial court's order by an appellate court without hearing and without providing real parties in interest an opportunity to be heard, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution when real parties in interest had indicated a desire to be heard and alleged that the party moving in the appellate court had

misstated the law to, and withheld determinative evidence from, that court?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the United States Constitution.

> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."
>
> Amendment XIV: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Los Angeles Superior Court, Rule 25, section 2: "The names of prospective jurors shall be taken from the last published and available registered voters' list of Los Angeles County through the use

of automated random selection. . . ."

STATEMENT OF THE CASE

A. HISTORY OF THE CASE

On October 11, 1974 a judge of the Superior Court for Los Angeles County, California, granted petitioners' motion to quash the jury venire selected pursuant to Local Rule 25 and directed the jury commissioner to provide a panel of jurors selected by a method which ensured the opportunity for full participation of all cognizable groups in the community.

On November 8, 1974, respondents filed a Petition for Writ of Mandate in the Court of Appeal of the State of California.

On November 13, 1974, petitioners filed a Declaration and Request for Extension of Time Within Which to File Points and Authorities in Opposition to the Petition for Writ of Mandate. Petitioners therein alleged that whereas respondents' statement of fact in the Court of Appeal was a little over one page long, the record before the trial judge was in excess of 250 pages of transcript and 65 pages of technical exhibits, that respondents had

withheld all of said exhibits and a significant portion of said transcript from the Court of Appeal, that petitioners intended to prepare a complete statement of fact and brief in opposition to respondents and therefore an additional sixty days was requested within which to file said brief.

Petitioners received no response from the Court of Appeal concerning their request. Without notice or hearing, on November 26, 1974 the Court of Appeal granted a peremptory writ of mandate.

A timely petition for rehearing was denied by the Court of Appeal on December 17, 1974 and a timely petition for hearing was denied by the California Supreme Court on January 23, 1975.

B. HOW THE FEDERAL QUESTION AROSE

Moving papers submitted by petitioners in support of their motion to quash the jury venire in the Superior Court of Los Angeles County invoked the Sixth Amendment and the Equal Protection and Due Process Clauses of the United States Constitution. Although the superior court's order granting

petitioners' motion expressly invoked the Equal Protection Clause of the Fourteenth Amendment, the memorandum of decision in support of said order also incorporated the Sixth Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

After the California Court of Appeal issued its peremptory writ of mandate commanding the Los Angeles Superior Court to set aside its order granting petitioners' motion, petitioners alleged both in the petition for rehearing in the Court of Appeal and subsequently the petition for hearing in the California Supreme Court, that:

(a) The Sixth and Fourteenth Amendments to the United States Constitution impose an affirmative duty to provide a jury panel representative of the community. Where substantial underrepresentation is found, as in the case at bench, the process of selection is presumptively unlawful. No compelling state interest has been shown to justify

said underrepresentation herein.

(b) The California Court of Appeal deprived petitioners of the right to be heard in clear contravention of the judicial policy favoring review of the jury selection process stated by this Court in Peters v. Kiff (1972) 407 U.S. 493 at 505. (Peters v. Kiff was cited for this proposition only in the petition for hearing before the California Supreme Court.)

C. STATEMENT OF FACTS

Pursuant to Local Court Rule 25, the petit jury venire of the Superior Court of Los Angeles County, California, is chosen exclusively by random selection of names from lists of registered voters.

In an effort to ascertain whether it represented a fair cross section of the community, a study was conducted in 1972 and 1973 of the venire's demographic characteristics. For accuracy of comparison, characteristics documented in the United States Census were studied and the

census definition of poverty--family income less than $5,000--was adopted. Thirteen comparisons with census figures for Los Angeles County resulted, including as a partial example:

Annual Family Income Less Than $5,000:	
Impaneled Juror Families	5.4%
Los Angeles County Families as a whole	15.9%
Monthly Rental Less Than $80:	
Impaneled Juror Families	5.2%
Los Angeles County Families as a whole	24.2%
Percentage Not Finishing High School: (25 years and older)	
Impaneled Jurors	9.8%
Los Angeles County as a whole	38%

The study also revealed that of the poor serving on the Los Angeles petit jury, only 5.5% were Blacks and 7.3% Latins whereas census figures indicated that 18.3% of the poor in Los Angeles are Blacks and 21.7% Latin. These findings were cross-evaluated and verified.

The foregoing evidence was presented at a hearing in the Superior Court for

Los Angeles County in support of petitioners' motion to quash the venire.

Additional evidence of an unrelated study comparing the general population with registered voters within the same census tracts was presented. This study revealed the three poorest tenths of Los Angeles County to be underrepresented on voter registration lists by 31.18%, 25.40% and 32.59% respectively. The wealthiest tenth was overrepresented by 34.45%.

Two sociologists indicated in great detail the set pattern of responses and attitudes which uniquely characterize the poor because of a divergent life experience. The divergence was shown not only to establish the poor as a cognizable group, but to result in the easily mistaken disbelief of a poor witness by a nonpoor juror in that poor persons accept as the norm that which may be unusual and unacceptable to the nonpoor. Both enjoy a unique psychological outlook.

Expert testimony also established that Black persons constitute a cognizable group, have undergone life experiences dissimilar to those of other Americans

and speak a form of "language" which non-black jurors may erroneously deem ignorant and uneducated. In many instances, such a juror would be incapable of comprehending the experience related by a poor, Black witness.

None of the foregoing evidence was rebutted. The Superior Court for Los Angeles County granted petitioners' motion to quash the jury venire. It held that exclusive reliance upon voter registration lists on the facts shown deprived petitioners--all of whom are young, poor, and Black--of equal protection of the law, due process of law and the right to a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The superior court directed the Jury Commissioner to select a jury panel which represented a fair cross section of the community, including the poor.

REASONS FOR GRANTING THE WRIT

I. INTERVENTION BY THIS COURT IS PROPER.

This court may not enjoin pending state prosecutions except under extraordinary

circumstances where the injury confronting the petitioner is great, immediate and irreparable (Younger v. Harris [1971] 401 U.S. 37). Petitioners present such a case.

In contrast to a criminal defendant who wishes to abort state proceedings, intervention is proper when a petitioner demands enforcement of a constitutional right basic to a fair trial, even though that trial may be pending. Federal intervention is appropriate since the constitutional right in question affects the petitioner's then-present circumstances and his ability to secure a trial which comports with constitutional mandates (Braden v. 30th Judicial Circuit Court of Kentucky [1973] 410 U.S. 484, 490-1; Chaucey v. Second Judicial District Court, Reno, Nevada [1971] 453 F.2d 389, 390, fn. 1).

Similar to the constitutionally guaranteed right to speedy trial enforced in Braden, supra, and Chaucey, supra, petitioners herein do not seek to abort or enjoin state proceedings but rather seek to enforce their right to that trial by

an impartial jury selected from a fair cross section of the community (Taylor v. Louisiana [1975] ____ U.S. ____; 95 S.Ct. 692).

As in Braden and Chaucey, petitioners herein have presented their claim in every level of the state judicial system and have been denied by all. Because the nature of the right invoked herein affects the fact finding process itself, only a remedy prior to the inception of that process will suffice (cf. Gibson v. Berryhill [1973] 411 U.S. 564, 578).

Basic to this Court's doctrine of non-intervention is recognition that due to principles of equity, comity and federalism, a federal court must not act where state courts will provide a petitioner the necessary vehicle for vindicating his constitutional rights (see Steffel v. Thompson [1973] 415 U.S. 452, 460-1). No such vehicle is available to petitioners.

Asking petitioners to suffer trial by a constitutionally defective jury and waiting for them to reassert their federal claim in California courts would be an exercise in futility. California

courts rely upon the rule challenged herein almost exclusively and a different rule would have an overwhelming effect on the administration of justice if not limited to prospective application (see Halliday v. United States [1969] 394 U.S. 831; In re Yurko [1974] 10 Cal.3d 857, 865). Because California does not follow the approach adopted by this Court of applying such a rule to the aggrieved party responsible for bringing the issue to judicial attention and thereafter prospectively (Stovall v. Denno [1967] 388 U.S. 293, 301), but rather to future litigants only (see, e.g. In re Stewart [1974] 10 Cal.3d 902; In re Yurko [1974] 10 Cal.3d 857; People v. Hitch [1974] 12 Cal.3d 641), petitioners' right to a jury selected from a fair cross section of the community will be forever lost if not granted at this juncture (see dissenting opinion of Mosk, J. and Peters, J.: Westbrook v. Mihaly [1970] 2 Cal.3d 765, 802).

Even absent the foregoing considerations, the Court of Appeal Order printed in Appendix A hereto appears on its face

to constitute a written opinion with reasons stated, is therefore res judicata with reference to the issues therein and therefore bars litigation of the question on appeal (see People v. Medina [1972] 6 Cal.3d 484). For this further reason, California courts do not provide a vehicle for vindicating petitioners' rights pursuant to the United States Constitution.

II. VOTER REGISTRATION LISTS PER SE DO NOT REFLECT A CROSS SECTION OF THE COMMUNITY AS DEMONSTRATED BY THE UNCONTROVERTED EVIDENCE.

When considered in light of the uncontroverted evidence before the trial court, the order of the California Court of Appeal herein creates a conclusive presumption that this Court's requirement that a criminal jury be chosen from a fair cross section of the community is met whenever a local judicial district relies exclusively upon voter registration lists as the source of trial jurors. To allow the decision below to stand is to permit blind application of a mechanical

standard, without regard for evidentiary fact, when measuring a jury venire against the standards of the Constitution.

This case presents the same considerations which this Court evaluated in Taylor v. Louisiana (1975) ____ U.S. ____, 95 S.Ct. 692:

> ". . . selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." (____ U.S. ____, ____, 95 S.Ct. 692, 697.)

The study of the Los Angeles County Superior Court venire in the case at bench did not sample a mere portion of that venire but interviewed every person serving in the central district during a given five week period. Poor persons were found to comprise 5.4% of those jurors whereas they comprised 15.9% of the population in Los Angeles County as a whole. The poor were therefore underrepresented by 66-2/3% on the venire. Absence of poor from the venire excludes from jury deliberation the common sense

judgments and distinct experience and perceptions of a large part of the Los Angeles community.

Voter registration lists, the exclusive source of the Los Angeles venire, were also studied and were found to grossly underrepresent the poor and overrepresent the affluent. Exclusive reliance upon such a lopsided source results in systematic overrepresentation of the affluent, rendering the resultant jury an exclusive organ of the economically and socially privileged. Such a selection procedure is abhorrent to the fundamental values of a democratic society, values embodied in the Constitution and recognized by this Court. The jury must "be a body truly representative of the community . . . and not the organ of any special class or group"(Glasser v. United States [1942] 315 U.S. 60, 86).

Unquestioning reliance exclusively upon voter registration as a source of jurors fails to pass constitutional muster for the further reason that such lists vary over time in relation to the population for reasons totally inapplicable to

juror qualification.

> "What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place." (Taylor v. Louisiana, supra, ____ U.S. ____, ____, 95 S.Ct. 692, 701.)

California law does not require registration to vote as a prerequisite to jury service, although the Local Rule of Court challenged herein achieves that result. Because of voter apathy in the last statewide election alone, over 3.5 million persons were deleted from voter registration rolls in California because of their failure to exercise the franchise.[1/] It is established that it is the poor and minorities who fail to exercise the franchise to a greater degree than the affluent, older majority. Current voter registration lists therefore distort the

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1/ Correspondence between the office of the Los Angeles County Public Defender and the office of the Secretary of State for the State of California verifying this information is printed in Appendix C hereto.

fair cross section concept to even a greater degree than those involved in the case at bench.

Petitioners do not seek a jury of any particular composition, but rather a jury selected from a venire which provides the opportunity for service to all cognizable groups in the community.

> ". . . the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." (Taylor v. Louisiana, supra, ____ U.S. ____, ____, 95 S.Ct. 692, 702.)

The case at bench reveals that in the most populous county of the most populous state in the nation the poor uniformly do not register to vote whereas the converse is true of the affluent. There is reason to suspect this fact is true nationwide.

Petitioners have made a conclusive unrebutted showing that in Los Angeles County the voter registration lists from

which the jury venire in the instant case was selected systematically underrepresent the poor, particularly poor Black persons. That said selection process is justified by a compelling state interest has not been and cannot be shown by the state. Under the uncontroverted evidence presented by petitioners and accepted by the trial court, the state's use of such lists violates the Sixth and Fourteenth Amendments to the United States Constitution.

III. PETITIONERS HAVE BEEN DEPRIVED OF DUE PROCESS OF LAW.

The petition filed with the California Court of Appeal by respondents herein contained blatant misrepresentations of fact and law. Petitioners attempted in the only available method to call that court's attention to the fact that all evidence before the trial court had not been presented to it and requested an opportunity to brief those facts and the relevant law prior to any action by the court.

Issues presented by the instant case are of overriding public importance and

properly are subject for, at the very least, a full hearing. As recognized by this Court in Peters v. Kiff (1972) 407 U.S. 493, when any significant cognizable group is underrepresented in jury service,

> ". . . the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknowable . . . [and therefore] deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." (407 U.S. 493, 504-505.)

By its order, the California Court of Appeal sought to justify its issuance of a peremptory writ without permitting petitioners the opportunity even to brief the matter on the tenuous ground of "serious administrative problems" and the "uncertainty" over the jury selection process. This reasoning is clearly contrary to this Court's policy favoring review of the jury selection process, as

exemplified by the case at bench (see Peters v. Kiff, supra, 407 U.S. 493, 505).

Petitioners asserted and the Los Angeles County Superior Court found an invasion of their substantive rights under the United States Constitution. That court did not make its finding lightly; it acted on the basis of an extensive, uncontroverted evidentiary hearing. The Due Process Clause of the Fourteenth Amendment to the United States Constitution bars a contrary ruling on that record, absent an opportunity by all parties fully to brief relevant facts, and applicable law (cf. Brinkerhoff-Farris Trust and Savings Co. v. Hill [1930] 281 U.S. 673, 677-679). State appellate procedures must conform to federal standards of Due Process and Equal Protection (Douglas v. California [1963] 372 U.S. 353).

In Ross v. Moffitt (1974) ____ U.S. ____, 94 S.Ct. 2437 this Court held that Due Process does not require that the State appoint counsel for a convicted person for the purpose of representing him on a

discretionary appeal. This Court reasoned, however, that because the State initiates a criminal proceeding Due Process requires the appointment of counsel for the accused at trial in order to insure the integrity of the fact-finding process. In reaching its conclusion this Court stated that on appeal it is ordinarily the defendant, rather than the State, who initiates the appellate process in order to overturn the findings of the trial judge or jury. (____ U.S. at ____, 94 S.Ct. at 2444.)

The Court's rationale in Ross applies equally to petitioners' right to be heard in the case at bench. Petitioners prevailed in the trial court, which found that the use of voter registration lists as the exclusive source of jury selection will not conform to the fair cross-section requirement of the Constitution. In order to overturn this wholly supported finding of the trial court, the State initiated the appellate process and "haled" petitioners into appellate court. (Cf. Ross v. Moffitt, supra.) Petitioners thus were, for purposes of Due Process, in the

analogous position of the State vis-á-vis the accused on appeal. Having prevailed below, as an incident to protecting their Due Process presumption of innocence and to secure a constitutionally compatible jury selection system for trial, petitioners were entitled to be afforded the opportunity to be heard on appeal.

Just as the State may not dispense with the fact-finding stage of proceedings under Ross v. Moffitt, supra, it must guarantee trial juries be drawn from a venire which does not systematically exclude distinctive groups in the community and therefore fail to be reasonably representative thereof (Taylor v. Louisiana [1975] ____ U.S. ____, 95 S.Ct. 692). The Superior Court for Los Angeles County determined that a trial jury which comports with that mandate cannot be selected exclusively from voter registration lists. Petitioners therefore cannot be deprived of that guarantee as applied to them by the Superior Court for Los Angeles County absent the due process requirements of an opportunity to be heard. The action of the California

Court of Appeal was in violation of the Fourteenth Amendment to the United States Constitution, a violation magnified by the fact it deprived petitioners of their final right to a full adversary hearing.[2/]

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2/ There is no absolute right to hearing by the California Supreme Court and, as indicated in topic II, supra, a post-trial appeal will not vindicate the deprivation of rights in question herein.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Court of Appeal of the State of California, Second Appellate District, Division Four.

Respectfully submitted,

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